82-1709

Office-Supreme Court, U.S.
F I L E D
APR 14 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEROME S. WAGSHAL,

Petitioner,

v.

~~CROZER CHESTER MEDICAL CENTER, UNIVERSITY OF SOUTHERN CALIFORNIA, and~~ COMMONWEALTH OF MASSACHUSETTS, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does the 11th amendment bar a "common benefit" fee award in favor of an attorney and against a state where that state has accepted direct and substantial economic benefits from the attorney's services to it and the other members of the class it represents:

(a) Is a "common benefit" fee award one of those types of traditional, equitable fee awards which falls outside the 11th amendment bar, as held in *Hutto v. Finney*, 437 U.S. 678.

(b) Is a "common benefit" fee award a form of award of costs, and thereby outside the bar of the 11th amendment.

2. Does a state which engages an attorney to represent it under an arrangement whereby it agrees to pay only its pro rata share of a class action fee award which would be made in the event the litigation is successful, thereby waive its 11th amendment immunity with respect to a fee award when it appears in the litigation and accepts the direct and substantial benefits of the attorney's services.

3. When an attorney provides direct and substantial benefits to a class which includes state entities, does the 11th amendment completely remove the equity power of the federal courts to provide a "common benefit" fee award.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEROME S. WAGSHAL,

Petitioner,

v.

CROZER-CHESTER MEDICAL CENTER, UNIVERSITY OF SOUTHERN CALIFORNIA, and COMMONWEALTH OF MASSACHUSETTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 3, 1982, and the subsequent denial of petitioner's petition for rehearing on January 14, 1983.

OPINIONS BELOW

This petition seeks review of a decision by the Court of Appeals affirming a judgment of the United States District Court for the District of Columbia.

The district decision is attached as App. 5a.

The Court of Appeals affirmance is attached as App. 1a.

The Court of Appeals denial of a timely petition for rehearing is attached as App. 4a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 3, 1982, and the subsequent denial of petitioner's petition for rehearing on January 14, 1983, and this petition for certiorari is filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS
AMENDMENT 11.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

Nature of the Case

This is an action brought by Jerome S. Wagshal, Esquire (hereinafter "Petitioner") for the award of a reasonable attorney's fee for services rendered to Massachusetts and the class of governmental entities which it typifies. The services in question consist of the representation of Massachusetts (by written retainer agreement, copy of which is attached at App. 9a) in a case brought in the United States District Court for the District of Columbia to obtain

release of impounded grant funds. Massachusetts' agreement specifically bound it to pay its pro rata share of a fee award to be made by the district court in the event of success; no other basis of payment was agreed to.

The litigation was successful, and many tens of millions of dollars were released to Massachusetts and other states as a result of petitioner's efforts. Now Massachusetts seeks to avoid payment of a fee for this service by claiming that it is shielded by the eleventh amendment from being made subject to the very kind of award it agreed to be subject to in the retainer agreement.

Course of Proceedings; Disposition Below

The complaint for a reasonable attorney's fee was filed on February 4, 1977. App. 11a-18a. (Jurisdiction was founded on 28 U.S.C. § 1332(a) and jurisdiction was also asserted during the litigation as an ancillary proceeding to the original *NAMH* case. See text, *infra.*) Service was made thereafter by mail, and Massachusetts appeared on July 31, 1978. Massachusetts moved to dismiss the complaint on various grounds, including a claim of immunity under the eleventh amendment to the Constitution (hereinafter "the 11th amendment"). The district court (Flannery, J.) granted Massachusetts' motion on October 23, 1979, on the ground of Massachusetts' asserted immunity under the 11th amendment. App. 5a-8a.

On August 25, 1981, the court issued a further Order pursuant to Rule 54(b), Fed.R.Civ.P., finding that there was no just reason for delay, and ordering entry of judgment on the Order of October 22, 1979 granting Massachusetts' motion to dismiss. Appeal followed. Dismissal was affirmed.

Statement of Facts

In the latter part of 1973, petitioner was retained by a consortium of organizations and individuals having concerns about the impoundment of federal appropriations intended for grants to support various aspects of funding mental health activities, projects and programs. Suit was brought on behalf of these parties, *sub nom, National Association for Mental Health, et al., v. Weinberger,* Civil Action 1812-73 (D.D.C.) (hereinafter "the *NAMH* case").

The terms of petitioner's retainer were that certain funding members of the plaintiff classes would jointly pay petitioner an hourly fee substantially below petitioner's regular and normal charge. It was agreed that if petitioner obtained the desired relief, he would petition the court for the award of a reasonable attorney's fee from the class benefiting grant recipients.

Massachusetts participated in this arrangement as a named plaintiff. Its telegram retainer dated September 13, 1973, App. 9a, sets out the terms of the arrangement, in effect making Massachusetts a member of the class and the class representative. The class of grant recipients was subsequently certified by the district court. This document was signed on behalf of Massachusetts by Walter H. Mayo III, Chief, Administrative Division Department of the Attorney General.

The contemplated action was filed, this being the *NAMH* case, and, as requested, Attorney General Quinn, and his assistants, attorneys Mayo, Wolfe, and Lynch, were all listed as "Of Counsel".

---

[1]Facts stated herein are taken primarily from the complaint, App. 11a, *et seq.*, which must be assumed to be true, since the decision adverse to petitioner was on motion to dismiss.

The action was successful, and, overall, resulted in the release of about $444,565,000 in Fiscal 1973 and Fiscal 1974 Petitioner was the attorney whose efforts brought about this result, and who conferred the benefits thereof on Massachusetts and others similarly situated. Complaint, ¶¶ 12-14. Petitioner thereupon made application to the court for an award of a reasonable attorney's fee, and such an award was made in the approximate sum of $86,000 out of the released grant funds, but on appeal it was determined that an award from that source was improper. *National Association for Mental Health, Inc. v. Weinberger,* 68 F.R.D. 387 (D.D.C. 1975), *rev'd sub nom National Association for Mental Health v. Califano,* Nos. 75-2212, 2245 (D.D.Cir. 1977) (no published opinion). The district court found, however, that substantial benefits had been conferred by petitioner:

> In this action, Mr. Wagshal has conferred a very substantial benefit upon both the public and the class members. He succeeded in obtaining a judicial decree declaring illegal the huge impoundment of funds by the Executive Branch. For plaintiffs, he obtained release over two fiscal years of almost half a billion would have been able to run their programs or research projects without these funds.

68 F.R.D. at 393. The reversal did not attack these findings. Indeed, although Massachusetts has sought, thus far successfully, to avoid payment of a fee, it has never contested the conclusion that it has received enormous benefits as a result of petitioner's efforts. The district court also found that, "During the case on the merits Mr. Wagshal exhibited substantial legal skill in addressing the complex issues involved . . . . Mr. Wagshal devoted himself tirelessly to prosecution of this action and served

his clients well." Again, these findings were neither undercut by the reversal, nor have they been attacked by Massachusetts.

The instant case was filed in February 1977 when the original fee award from grant funds was being appealed, and when it appeared that there were "grave doubts" as to whether a fee award made from unexpended grant funds would be sustained. Accordingly, plaintiff brought this action seeking an award directly from the benefiting class members for benefits conferred upon them. One of these class members was Massachusetts.

As noted above, Massachusetts obtained dismissal of the complaint solely on the ground of asserted 11th amendment immunity.

REASONS FOR GRANTING THE WRIT

This petition seeks review of three novel and important issues, each which merit this Court's attention. For each issue, the decision in petitioner's favor would appear to be required by prior decisions of this Court. However, the lower court judgment against petitioner veers away from, and thereby, limits or impliedly reverses this Court's prior decisions.

First, the lower courts in this case have decided that a "common benefit"[2] is not such a fee award as can be made against a state because of the shield of the 11th amendment. That specific issue has never been before this Court, but the logic leading to the opposite result has been

[2]A "common benefit" fee award is the same as a "common fund" award except that there is no fund from which the award can be made and the award must be made "directly from the other parties enjoying the benefit." *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240, 258-259.

established by prior decisions. In *Hutto v. Finney,* 437 U.S. 678, this Court held that, regardless of the 11th amendment a fee award based on traditional equitable grounds can be made against a state. *Hutto* dealt specifically with (i) the established equitable basis of "bad faith," and (ii) the allowance of "costs" as grounds for a fee award, but *Hutto* logically applies to all established equitable grounds for such fee awards. In *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240, 259, this Court reviewed all the various grounds for fee awards, and held that "common benefit" fee awards have traditionally been made in equity – that this "rule has been consistently followed." Thus *Alyeska* necessarily brings the "common benefit" fee award doctrine within the scope of *Hutto.* However, in this case, the lower courts have rejected this analysis, thereby incorrectly limiting both *Hutto* and *Alyeska.* Further, this Court has held in *Sprague v. Ticonic National Bank,* 307 U.S. 161, that the allowance of "common benefit" attorneys' fees is a form of allowance of costs. This dovetails with the holding in *Hutto,* 487 U.S. at 695-697, that costs in the form of attorneys' fees may be awarded regardless of the 11th amendment. The lower courts in this case have rejected this rule, thereby incorrectly limiting both *Sprague* and *Hutto.*

Second, review should be granted to determine a novel question of waiver of 11th amendment immunity. In *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 74, this Court held that there was an "invariable practice" to adjudge costs against a state litigant regardless of the 11th amendment on the ground that a state waives its 11th amendment immunity when it becomes a litigant in a federal court. The award sought here is a form of costs, this again, being a holding made in *Alyeska, supra,* and

before that in *Sprague, supra.* Yet for this class of costs, the lower courts have refused to apply the "invariable practice" noted in *Fairmont Creamery Co. v. Minnesota, supra.*

Finally, this case overall has yielded a result which is believed to be unprecedented among this Court's decisions, namely, that an attorney admittedly merits a reasonable fee award under the "common benefit" doctrine and nevertheless the federal courts cannot find an equitable mechanism to make the award. In *Sprague v. Ticonic National Bank, supra,* 307 U.S. at 164-167, this Court spoke in the broadest and strongest conceivable terms of the historic "power of equity in doing justice between a party and the beneficiaries of his litigation." Unless reversed, the lower courts' decision will create a serious gap in this equitable jurisdiction of the federal courts.

I

The principal issue meriting the granting of a writ is that the decision of the lower court is inconsistent with principles of law established by this Court in other cases. These principles lead to a contrary result with logic of syllogistic purity. Thus in *Hutto, supra,* this Court established that attorneys' fee awards may be made on traditional grounds even against states, and regardless of the 11th amendment (All men are mortal), and in *Alyeska* and *Sprague, supra,* this Court established that the "common benefit" fee award is one form of a traditional, equitable fee award (Socrates is a man). Nevertheless, the lower courts have held in this case that Socrates was not mortal.

It is noteworthy that the lower courts never squarely

dealt with this logic. The district court discussed *Hutto* but misinterpreted petitioner's position as arguing that *Hutto* merely stands for the proposition that "the eleventh amendment's immunity was not absolute . . . ." App. 11. The court did not focus on petitioner's real position, that *Hutto* permits fee awards on all traditional equitable grounds. In other words, the specific application of *Alyeska* and *Sprague* to *Hutto* was not considered. Neither *Alyeska* nor *Sprague* was mentioned. The court of appeals' affirmance did not remedy this failure of analysis.

It therefore is left to this Court to put the matter to rights. Each of the cases involved here, *Hutto, Alyeska,* and *Sprague, supra,* was judged by this Court to be worthy of its consideration on writ of certiorari. The necessary relationship of these decisions deserves no less consideration, particularly when the lower courts appear to have misapplied or ignored these landmark decisions.

II

The question of 11th amendment waiver has been repeatedly considered by this Court to be a subject worthy of it review, stretching from *Clark v. Barnard,* 108 U.S. 436, through *Fairmont Creamery Co. v. Minnesota, supra,* and *Gardner v. New Jersey,* 329 U.S. 565, 575, and thereafter to *Hutto, supra,* which, at 437 U.S. at 696, cited *Fairmont Creamery Co.* with approval.

Again the logic of the rule established by this Court is clear. Costs may be imposed on a state which voluntarily appears in a federal court as a litigant. *Fairmont Creamery Co. supra.* This Court has established that the award of a common benefit attorney's fee is a form of an award of

costs. *Alyeska* and *Sprague, supra.* Again, however, this syllogistic logic has been ignored by the lower courts.

CONCLUSION

In summary, this Court should review the decision of the lower courts to establish and confirm the necessary relationship of several landmark decisions whose nexus with each other has been overlooked and misinterpreted by the lower courts.

Respectfully submitted,

JEROME S. WAGSHAL
JEROME S. WAGSHAL, P.C.
3256 N Street, N.W.
Washington, D.C. 20007

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition was mailed postage prepaid this 14th day of April 1983 and thereafter in printed form to:

Stephen S. Ostrach, Esquire
Department of the Attorney General
Government Bureau, Room 2019
One Ashburton Place
Boston, MA 02108

Robert L. Moore, II, Esquire
Miller & Chevaler
Metropolitan Square
655 15th Street, N.W.
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Suite 800
Washington, D.C. 20006

_____

Jerome S. Wagshal

APPENDIX A

NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2040 September Term, 1982

JEROME S. WAGSHAL,

Appellant,

v.

CROZER-CHESTER MEDICAL CENTER, et al.,

Appellees.

United States Court of Appeals for the District of Columbia Circuit
FILED
DEC 3 1982
GEORGE A. FISHER
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: MacKINNON and GINSBURG, Circuit Judges; and McGOWAN, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. While the issues presented have been accorded full consideration by the court, they do not occasion the need for an opinion. *See* Local Rule 13(c).

On consideration of the foregoing, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is affirmed, for the reasons set forth in the accompanying Memorandum.

FURTHER ORDERED that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

/s/_____
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

MEMORANDUM

The judgment of the District Court is affirmed for the reasons set forth in the Memorandum accompanying its Order.

The Eleventh Amendment bars any action by Mr. Wagshal in *federal court* against the State of Massachusetts to recover payment for legal services which he rendered. *In Re Ayers,* 123 U.S. 443, 503-05 (1887); *Hans v. Louisiana,* 134 U.S. 1, 20 (1890); *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459 (1945); *Litton Industries, Inc. v. Colon,* 587 F.2d 70 (1st Cir. 1978). However, this does not mean that petitioner is without recourse. As the State of Massachusetts has

acknowledged, Mr. Wagshal may institute an action in state court to recover any payment to which he may be entitled. Counsel for the Commonwealth stated at oral argument:

> He [Mr. Wagshal] has — and we've never denied this for a moment — a good faith entitlement to money from the Commonwealth.
> He provided us a service.
> [He provided] a substantial benefit to the Commonwealth after having received from the Commonwealth an indication that we wanted him to do that.

It is thus clear that a Massachusetts state court is the proper forum in which to present this claim of entitlement.

During Mr. Wagshal's attempt to secure remuneration by order of the federal courts, several years have elapsed. However, statements made by Counsel at oral argument indicate that no statute of limitations plea would be raised as an affirmative defense to an action brought by Mr. Wagshal in state court. The State's brief also asserts that the courts of Massachusetts provide the appropriate forum, and Counsel's statements at oral argument recognizing that the State could settle the claim or decline to raise the statute of limitations defense, are construed as assurances that Mr. Wagshal will have the opportunity to present his claim against the State of Massachusetts for payment of legal services rendered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2040 September Term, 1982

Jerome S. Wagshal,
Appellant Civil Action No. 77-00215

v.

Crozer-Chester Medical
Center, et al. ARGUED 9-29-82

BEFORE: MacKinnon and Ginsburg, Circuit Judges and McGowan, Senior Circuit Judge

ORDER

On consideration of appellant's petition for rehearing, filed January 3, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

*By: /s/*_____
Robert A. Bonner
Chief Deputy Clerk

United States
Court of Appeals
for the District
of
Columbia Circuit
FILED
DEC 3 1982

GEORGE A. FISHER
CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME WAGSHAL, Plaintiff (Petitioner), v. CROZER-CHESTER MEDICAL CENTER, et al., Defendants.	Civil Action No. 77-02
NATIONAL ASSOCIATION FOR MENTAL HEALTH, Plaintiff, v. DEPARTAMENT OF HEALTH, EDUCATION AND WELFARE, Defendant.	Civil Action No. 1812

FILED
OCT. 22 1979
JAMES F. DAVEY, Clerk

MEMORANDUM AND ORDER

This action arises from legal services rendered by the petitioner in a successful attempt to obtain release of impounded federal funds. These funds had been intended as grants to the present defendants for purposes of various mental health programs, but they were released only in response to the petitioner's initial suit. Pursuant to a re-

tainer agreement providing for a rate of $35.00 per hour, the petitioner received from a consortium of interested parties roughly $25,000.00. The original suit having obtained the release of roughly $444,565,000.00, the petitioner sued for additional fees, relying primarily on the equitable principle of quantum merit. This court awarded the petitioner some $86,000.00 Out of the released funds, but on appeal it was determined that an award from that source was improper. Next the petitioner sought an award from the individual defendants, and the Commonwealth of Massachusetts, a defendant in each of the consolidated cases, moved to dismiss with respect to itself.

Massachusetts raises a number of grounds for dismissal, but the court finds it necessary to consider only one of these, the eleventh amendment to the United States Constitution.

Fatal to the petitioner's case is a principle discussed by the Supreme Court as early as 1887:

> For a breach of its contract by the state, it is conceded there is no remedy by suit against the state itself. This results from the eleventh amendment to the constitution, which secures to the state immunity from suit by individual citizens of other states or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the state by name, but all other actions and suits against it, whether at law or in equity.

In Re Ayers, 123 U.S. 443, 502 (1908).

In his Opposition to the motion to dismiss, pp. 3-4, the petitioner cites *Hutto v. Finney,* 98 S.Ct. 2565 (1978), for the proposition that "a fee award under common law principles does not impinge on Eleventh Amendment im-

munity." *Hutto,* however, is significantly distinguishable from the case at hand. As the defendant points out, Initial Memorandum, p. 5,

> *Hutto* was an action *against state officials* (not the State of Arkansas) under the Fourteenth Amendment, and an award of attorney's fee was upheld by virtue of a finding of bad faith, explicit statutory authorization, and ... § 6 of the Fourteenth Amendment.

Moreover, as Justice Stevens noted there,

> In this case, the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. It vindicated the District Court's authority over a recalcitrant litigant.

Id. at 2574.

To be sure, *Hutto* could be cited to support the position that the eleventh amendment's immunity is not absolute, that bad faith combined with other circumstances constitutes an exception to the usual rule, and that the extraordinary circumstances here should be found to constitute another exception. Also, the petitioner arguably possesses a sort of moral entitlement to additional fees; this Massachusetts recognizes. But moral entitlement is not equivalent to legal entitlement, and in this case the court has been shown no authority for why the strictures of the eleventh amendment are inapplicable.

The petitioner argues that through its dealings with him Massachusetts has, in effect, waived its constitutional immunity. Although language in the cases cited by the plaintiff does indicate that this immunity can be set aside in certain circumstances, none of those cases involved a direct

monetary award against the state. Even if the court were inclined to engage in the sort of novel constitutional construction proposed by the petitioner, the principle sought to be established goes too far; to rule that Massachusetts has waived its immunity under the present circumstances would be to eliminate a major aspect of the eleventh amendment.

For the foregoing reasons, it is, by the court, this 22nd day of October, 1979,

ORDERED that the defendant's motion to dismiss should be, and the same hereby is, granted.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

G177272216 TDNT BOSTON MA 165 09-13 1255P EST
PM5 JEROME WAGSHAL ESQ CARE PIERCE AND
WAGSHAL , DLR
910 17 ST NORTHWEST
WASHINGTON DC 20005

YOU ARE HEREBY AUTHORIZED TO FILE SUITE IN THE US DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON BEHALF OF, AND TO REPRESENT THE COMMONWEALTH OF MASSACHUSETTS TO RECOVER FISCAL YEAR 1973 AND FISCAL YEAR 1974 IMPOUNDED ALCOHOLISM FORMULA GRANTS UNDER P.L. 91-616.

YOU MAY PLEAD A CLASS ACTION ON BEHALF OF OTHERS SIMULARLY SITUATED AS PART OF A COMPREHENSIVE NIMH CASE BEING BROUGHT BY THE NATIONAL ASSOCIATION FOR MENTAL HEALTH AND FEE ARRANGEMENTS ARE THAT MASSACHUSETTS WILL PAY ONLY ITS APPROPRIATE SHARE OF ANY CLASS ACTION FEE AWARD IN ACCORDANCE WITH YOUR LETTER RETAINER AGREEMENT WITH NAMH OF AUGUST 20 1973 AND ATTACHMENT B THERETO. YOUR HAVE INFORMED US OF YOUR ARRANGEMENT WITH THE STATE OF WISCONSIN AND WE DECLINED TO PARTICIPATE ON THAT BASIS. PLEASE ENTER THE FOLLOWING AS OF COUNCIL:
ROBERT H. QUINN, ATTORNEY GENERAL;
WALTER H. MAYO III, ASSISTANT ATTORNEY GENERAL;
ANDREW M. WOLFE, ASSISTANT ATTORNEY GENERAL;

SANDRA L. LYNCH, ASSISTANT ATTORNEY GENERAL.

WALTER H. MAYO III CHIEF, ADMINISTRATIVE DIVISION DEPARTMENT OF THE ATTORNEY GENERAL; 373 STATE HOUSE, BOSTON, MA 02133

APPENDIX C

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Pro se

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME S. WAGSHAL, 3526 N. Street, Northwest Washington, D.C. 20036, Plaintiff, -- against -- CROZER-CHESTER MEDICAL CENTER 15th & Upland Street Chester, Pennsylvania 19013 NATIONAL COUNCIL ON ALCOHOLISM DELAWARE VALLEY AREA, INC. 3401 Market Street Philadelphia, Pennsylvania 19107 UNIVERSITY OF SOUTHERN CALIFORNIA University Park Los Angeles, California 90007 COMMONWEALTH OF MASSACHUSETTS Office of the Attorney General 373 State House Boston, Massachusetts 02133, Defendants.	)	CIVIL ACTION No. 77-0215 JF COMPLAINT FOR A REASONABLE ATTORNEY'S FEE

Plaintiff, JEROME S. WAGSHAL, individually appears herein by his attorneys and complains of the aforenamed individuals as follows:

JURISDICTION AND VENUE

1. This action is brought to obtain declaratory relief, the award of equitable attorney's fees and the *quantum meruit* value of plaintiff's services from, and to prevent unjust enrichment by, the defendants and the members of the defendant class, all of whom are members of the plaintiff classes certified in *National Association for Mental Health, et al. v. Weinberger, et al.*, D.D.C., Civil Action No. 1812-73 (decided February 7, 1974) (hereinafter referred to as the "NAMH action"). The Court has jurisdiction over this action by virtue of 28 U.S.C. § 1332(a) (1970). The amount in controversy exceeds $10,000.00, exclusive of interest and costs. No defendant is a citizen of the District of Columbia.

2. Every defendant is within the jurisdiction of this Court for the purpose of service of process. Venue for this action is properly laid in the District of Columbia pursuant to 28 U.S.C. § 1391(a) (1970).

PARTIES

3. Plaintiff, JEROME S. WAGSHAL, is a citizen and resident of the District of Columbia. He is a duly admitted member of the District of Columbia Bar, and, since 1973, has maintained an office in the District of Columbia for the practice of law.

4. Each defendant is a citizen of a state other than the District of Columbia. On information and belief, each of the defendants was and is a benefiting member of one of the plaintiff classes certified in the NAMH action because it has obtained funds released as a result of the final judgment in that action.

CLASS ACTION ALLEGATIONS

5. Defendants are sued in their individual capacities and as representative of a defendant class, which consists of all persons and entities, other than citizens of the District of Columbia, who received funds released as a result of the successful litigation conducted by this plaintiff in the NAMH action.

6. The class numbers approximately 800 and, therefore, it is so numerous that joinder of all members is impracticable.

7. There are questions of law and fact common to the class, including, but not limited to, whether this plaintiff is entitled to the award of a reasonable attorney's fee from each of the defendant class members because of the benefits received by them as a result of his legal services.

8. Defendants' defenses are typical of the defenses of the members of the class. Defendants will fairly and adequately protect the interests of the class. They have no interests antagonistic to those of the remainder of the class because the essential nature of this action is the same as to all.

9. This action is maintainable as a class action pursuant to Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure because the prosecution of separate actions against individual members of the class would create a risk of

> (a) inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for plaintiff, or
>
> (b) adjudications with respect to individual members of the class, which, as a practical mat-

ter, would be dispositive of the interests of the other members not parties to the adjudications, or which would substantially impair or impede their ability to protect their interests.

10. Furthermore, this action may be maintained as a class action because plaintiff has acted on grounds generally applicable to the class, thereby making appropriate final equitable and declaratory relief with respect to the class as a whole.

COUNT ONE

11. In the latter part of 1973, plaintiff was retained by a consortium of organizations and individuals having concerns about the impoundment of federal appropriations intended as grants to support various aspects of funding mental health activities, projects and programs. Plaintiff agreed to bring an action seeking release of the impounded funds. Under their arrangement, certain members of the plaintiff classes would jointly pay this plaintiff a $35 hourly fee with the understanding that this was substantially below plaintiff's regular and normal charge. If this plaintiff obtained the desired relief, it was agreed that he would petition the court for the award of a reasonable attorney's fee from the benefiting class members.

12. Pursuant to the aforesaid retainer agreement, this plaintiff commenced the NAMH action, which resulted in the release of about $444,565,000 in Fiscal 1973 and Fiscal 1974 grant funds to members of this defendant class (members of the Plaintiff classes in the NAMH action). Pursuant to the terms of the retainer agreement, this plaintiff was paid about $25,000 under the $35 per hour arrangement.

13. The members of this defendant class further benefited from the final judgment in the NAMH action because said judgment halted illegal attempts by defendants in that action to curtail statutorily authorized programs. Many of the plaintiff class members in that action would not have been able to run their programs and projects without the funds released by the NAMH action.

14. Plaintiff was the attorney whose efforts brought about the final judgment in the NAMH action and, therefore, he is the attorney who conferred the benefits upon these defendant class members.

15. Plaintiff thereupon made application to the court for the award of a reasonable attorney's fee upon equitable principles. After notice and hearing, the court declined to exercise personal jurisdiction over the plaintiff class members in the NAMH action because it held that it could award plaintiff a fee out of some of the funds, the release of which plaintiff had obtained. Out of such funds, the district court awarded plaintiff a new award of $86,030.36. This decision is reported as *National Association for Mental Health, Inc. v. Weinberger*, 68 F.R.D. 387 (D.D.C. 1975) (hereinafter referred to as the "NAMH fee award decision").

16. Defendants in the NAMH action have appealed the NAMH fee award decision and that appeal presently pends in the United States Court of Appeals for the District of Columbia. Payment of the award has not been made to this plaintiff and it has been stayed. Although no decision has been rendered in said appeal as of the filing of this complaint, recent decisions of the aforesaid Court of Appeals raise grave doubts as to whether the award by the district court in the NAMH fee award decision, made out of unexpended grant funds, will be sustained and,

therefore, whether plaintiff will receive his equitable entitlements.

17. According, plaintiff is forced and constrained to bring this action, which seeks the award of a fee payable by the defendant benefiting class members, to protect and preserve his rights to such an award from the defendant class members. By this action, plaintiff seeks the award of a reasonable fee under equitable principle of *quantum meruit* for the services rendered to and the benefits provided the defendants and members of the defendant class.

COUNT TWO

18. Plaintiff realleges each and every allegation contained in paragraphs 1 through 17 as fully as if the same were restated at this point verbatim.

19. Unless plaintiff is awarded a reasonable fee for the services performed for and the benefits conferred on the defendants and members of the defendant class, said defendants and defendant class members will be unjustly enriched by the benefits conferred on them for which they will have not paid a reasonable attorney's fee.

PRAYER

WHEREFORE, plaintiff prays that this Court:

1. as soon as practicable, determine that this action is maintainable as a defendant class action;

2. enter a judgment declaring that a quasi-contractual relationship exists between plaintiff and the defendants, individually and as a class, whereby plaintiff is entitled to the reasonable value of legal services rendered the defendants by him;

3. to prevent defendants' unjust enrichment, award plaintiff a reasonable attorney's fee for the benefit conferred upon the defendants, individually and collectively, through plaintiff's legal services, and

4. grant further relief as may be necessary and appropriate.

DATED: February 4, 1977
Washington, D.C.

/s/

Samuel H. Seymour
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NO. 82-1709

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OF THE UNITED STATES

October Term, 1982

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v.

CROZER-CHESTER MEDICAL CENTER,
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Respondents.

On Petition For A Writ Of Certiorari
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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certorari to review the Court of Appeals decision, which that Court noted did "not occasion the need for [a published] opinion", that the Eleventh Amendment prohibits a federal court from hearing a fee collection action brought by an attorney against a state.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Statement of Interest.

This brief is submitted by the Attorney General of Massachusetts who represented the respondent Commonwealth

of Massachusetts below. The Attorney General respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the unpublished Judgment and accompanying Memorandum issued by the Court of Appeals for the District of Columbia Circuit on December 3, 1982. Appendix 1a-4a.

Statement of Facts and Prior Proceedings.

The respondent Commonwealth of Massachusetts does not quarrel with the substance of the facts as stated in petitioner's brief at pages 4-6. Those facts are that Mr. Wagshal, the petitioner, was retained by the Commonwealth and other parties to sue the federal government. He successfully did so and the Commonwealth and those other parties

benefited thereby. Id. However, it was determined that Mr. Wagshal could not be compensated for his efforts from the funds released by his lawsuit. National Association for Mental health, Inc. v. Califano, C.A. Nos. 75-2212, 75-2245, 561 F. 2d 1021 (D.C. Cir. 1977) rev'g 68 F.R.D. 387 (D.D.C. 1975). Subsequently, Mr. Wagshal moved in the original action and in a separate action for the District Court to order the original plaintiffs, including the Commonwealth, to pay him his fees "relying primarily on the equitable principle of quantum meruit." 6a. The District Court granted the Commonwealth's motion to dismiss on Eleventh Amendment grounds. 5a-8a. The Court of Appeals affirmed, 1a-3a, and denied Mr. Wagshal's petition for rehearing. 4a.

REASONS WHY THE WRIT SHOULD BE DENIED

As provided in Rule 17 of the Rules of this Court, "[a] review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor." The purpose of the Congressional grant of certiorari jurisdiction to this Court is to permit it to select cases "of such gravity and general importance" as to warrant review of the decision below. In Re Woods, 143 U.S. 202, 206 (1892); see also Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951) (". . . issuance of the writ is discretionary"); Wade v. Mayo, 334 U.S. 672, 680 (1948) ("[w]rits of certiorari are matters of grace."). This case does not raise any "special or important" issues that warrant certiorari review.

I. THE COURT OF APPEALS DECISION REFLECTS WELL-ESTABLISHED ELEVENTH AMENDMENT LAW.

A. The Eleventh Amendment Bars This Contract Claim.

The Court of Appeals holding in this case was that "[t]he Eleventh Amendment bars any action by Mr. Wagshal in federal court against the State of Massachusetts to recover payment for legal services which he rendered." 2a (emphasis in original). That holding is clearly correct. As the Court of Appeals recognized, Mr. Wagshal's claim is in essence a simple contract claim and the Eleventh Amendment denies federal courts jurisdiction of contract claims against a state. "For a breach of its contract by the State, it is conceded that there is no remedy by suit against the State

itself . . . . This immunity includes not only direct actions for damages for the breach of contract brought against the State by name, but all other actions or suits against it, whether at law or in equity." In Re Ayers, 123 U.S. 443, 502 (1887); see Litton Industries, Inc. v. Colon, 587 F. 2d 70, 73 (1st Cir. 1978) (Eleventh Amendment bars contract claim); see also Edelman v. Jordan, 415 U.S. 651, 665-67 (1974) (Eleventh Amendment also bars claims seeking "equitable restitution").

B. Hutto v. Finney Is Irrelevant To Any Issue In This Case.

In his brief (at 7) Mr. Wagshal claims that Hutto v. Finney, 437 U.S. 678 (1978), "permits fee awards [against a state] on all traditional equitable

grounds." But Hutto does not stand for any such broad principle. As the District Court correctly noted: "Hutto, however, is significantly distinguishable from the case at hand." 7a. Indeed, it is difficult to see any similarity at all between Hutto and this case except that they both involve attorneys' fees.

Hutto grew out of prolonged litigation involving the unconstitutional conditions of confinement in the Arkansas jails. In its decision this Court approved an award of attorneys' fees to the prevailing plaintiffs' attorneys from the defendants, who were officials of the Arkansas Department of Correction, payable out of the Department's funds. The fee award was based on two grounds, neither of which has any application

here. First, the Court noted that the District Court had found that defendants had litigated in bad faith which warranted an award of fees. Second, the Court noted that the substantive action had been brought under 42 U.S.C. §1983 and that 42 U.S.C. §1988 provides for the payment of attorneys' fees to prevailing plaintiffs in such actions by specifically defining such fees as compensable "costs."

One glaring difference between Hutto and this case is, of course, the fact that Mr. Wagshal never represented an adversary of the Commonwealth, but was instead hired by the Commonwealth to represent it. The Commonwealth thus is in the position of the prevailing plaintiffs in Hutto rather than in the role

of the losing defendants who had to pay the plaintiffs' attorneys' fees. Second, there has never been any finding that the Commonwealth litigated in "bad faith."[1/] Third, neither the original class action nor this separate action involved section 1983 and so section 1988 is plainly inapplicable. Finally, Hutto was brought as part of the original litigation while this case involves a new action entirely separate from the action in which the fees were incurred. For all of these reasons Hutto has no resemblance to this case at all.

Furthermore, this Court has made it quite clear that Hutto was not designed to open a wedge in the Eleventh

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1/ Indeed, since Mr. Wagshal was the Commonwealth's attorney, if there had been any such bad faith, it would have been attributed to him.

Amendment shield. Only a few days after Hutto the Court decided Alabama v. Pugh, 438 U.S. 781, 782 (1978) in which it reaffirmed that normally any suit against a state ". . . is barred by the Eleventh Amendment, unless [the state] has consented to the filing of such a suit."

To make the matter even clearer, the Court amplified its intent the next year in Quern v. Jordan, 440 U.S. 332, 338-45 (1979). In Quern the Court emphasized the continuing vitality of the Eleventh Amendment analysis contained in Edelman. Id. at 338-39. Thus even after Hutto it remains clear that that Amendment shields a state from federal judicial award of monetary relief except when: (1) the State has clearly waived such protection, or (2) Congress clearly has decided to

use its power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity in a specific category of case or activity. Quern, supra; Pugh, supra; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Except in those circumstances, neither of which applies here, ". . . it is undisputed that the [Eleventh] Amendment operates to bar award of a monetary judgment directly against the state . . .". Spicer v. Hilton, 618 F. 2d 232, 236 (3rd Cir. 1980). "If the State is named directly in the complaint and has not consented to the suit, it must be dismissed from the action." Florida Department of State v. Treasure Salvors, Inc., ___ U.S. ___, 102 S. Ct. 3304, 3314 (1982).

C. The Commonwealth Has Not Waived Its Eleventh Amendment Immunity.

Mr. Wagshal also contends that the Commonwealth has waived its Eleventh Amendment immunity from suit in the federal court. While it is true that immunity can be waived by a state,[2/] the Commonwealth has plainly not done so here.

The sole piece of evidence that Mr. Wagshal points to to support his claim of waiver is the telegram authorizing him to represent the Commonwealth. 9a-10a. That telegram might be sufficient to create a contract between Mr. Wagshal and the Commonwealth, but by no stretch of the imagination does it either explicitly or implicitly confer a right to

---

2/ See Alabama v. Pugh, 438 U.S. 781, 782 (1978).

sue on that contract in federal court. A waiver of Eleventh Amendment immunity must be shown either "by the most express language" or by "such overwhelming implications . . . as will leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673 (1974) (citations omitted); see also Florida Department of Health and Rehabilitation Services v. Florida Nursing Home Association, 450 U.S. 147, 150 (1981). No such showing has or could be made here.

Mr. Wagshal appears to confuse the status of the Commonwealth as a party and its status as a client. As a party, the Commonwealth's general appearance in the litigation left it open to possible

counterclaims from the opposing party.[3] But Mr. Wagshal was not the opposing party, he was the Commonwealth's attorney. The Commonwealth's retainer of his services in prosecuting the original action no more authorized him to sue for breach of that agreement than would the deposit of the Commonwealth's brief in a Federal Express delivery bin authorize that company to sue the Commonwealth in federal court for nonpayment of its fee. A state's contract with an attorney is not intrinsically different from its contract with anyone else and if the Eleventh Amendment bars federal suits to enforce state contracts --

---

3/ We note, however, that, contrary to Mr. Wagshal's suggestion, a state's general appearance in a case does not necessarily mean its Eleventh Amendment protection is automatically and totally void.

which it does -- then it bars collection suits by attorneys just as it bars such suits by plumbers. Mr. Wagshal's status as an attorney gives him no special rights at all. The Commonwealth never waived its Eleventh Amendment immunity from suit in federal court and so Mr. Wagshal's effort to bring such a suit was properly dismissed.[4/]

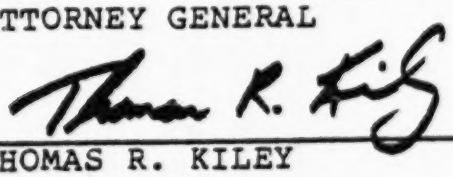
4/ The Eleventh Amendment is a complete bar to Mr. Wagshal's claim against the Commonwealth in federal court. However, as the Court of Appeals recognized, Mr. Wagshal is not totally without a forum to hear his claim of breach of contract. 2a-3a. Although it is under no legal obligation to do so, the Commonwealth has consented to being sued in contract in its courts. Mass. G.L. c. 258, §§1, 3. It is those courts which are the sole and proper forum for determining whether Mr. Wagshal is entitled to compensation from the Commonwealth. Of course, the state's consent to suit in its own courts is not itself a waiver of its immunity to suit in federal court. See Irwin v. Commissioner of the Department of Youth Services, 388 Mass. 810, 811, ___ N.E. 2d ___ (April 15, 1983).

CONCLUSION

The petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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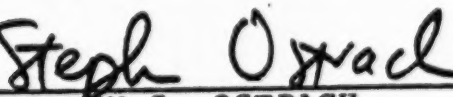

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PETITIONER'S REPLY BRIEF

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The Opposition of Respondent Commonwealth of Massachusetts ("Massachusetts") to this Petition for writ of certiorari is incorrect on several key areas. Correction of these errors highlights why certiorari should be granted.

I. THIS IS NOT A CONTRACT CLAIM

Massachusetts mischaracterizes petitioner's fee petition in the lower court as "a fee collection action," i.e., "a simple contract claim" by an attorney made against a former client to collect a fee. Were that premise true, the conclusion would follow that the Eleventh Amendment bars this action--absent waiver.*/

However, the premise is incorrect.

Petitioner's claim against Massachusetts is not based on contract. Rather, it is an application on equitable grounds for award of a class action attorney's from a benefitting class member. This Court has had a

*/ As to waiver, see infra, p. 8.

long history of defining the parameters of such class fee awards, stretching from early decisions such as Trustees v. Greenough, 105 U.S. 527 (1882) and Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1884), to the landmark holding in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), to more recent decisions such as Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).

Massachusetts' opposition completely ignores the principle of the class action fee award and also ignores Sprague and Alyeska, the seminal class action fee decisions which are relied upon in the petition.

The central issue presented by this petition, which merits determination by this Court, is whether a state may be required to pay its share of a class action fee award regardless of the Eleventh Amendment. This is a finely-honed, specific legal issue going to an important Constitutional provision.

Massachusetts has never questioned the power of the district court to make such an award from a common fund recovered by the attorney for the benefit of the class which includes sovereign states among its members. The issue presented here is an important variant, namely, can the benefitting class member which is a sovereign state be required to pay its aliquot share of such an equitable fee award directly to the attorney when, as here, the award cannot be taken from the common pot. In Alyeska, supra, 421 U.S. at 257, this Court reconfirmed

> ...the historic power of equity to permit the trustee of a fund or property...to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed. [Emphasis added; fn. omitted.] */

*/ This quote speaks in terms of recovery to the party. However, in Central Railroad & Banking Co. v. Pettus, supra, this Court established that the same principles apply to fee awards paid directly to the attorney for the class.

The issue presented here is whether the second of those two alternatives--payment by the benefitting class member as well as the fund--is available when the benefitting class member is a state.

II. THIS CASE RAISES AN OPEN ISSUE

Much of Massachusetts' opposition is devoted to a detailed listing of why the facts of this case differ from those in Hutto v. Finney, 437 U.S. 678 (1978). For example, Massachusetts points out that in Hutto this Court sanctioned fee awards against states who appeared in litigation as defendants whereas here the states are plaintiff class members. Mass. op. at 8-9. Massachusetts notes further that it has not been found to have acted in bad faith, one basis for the fee awards approved in Hutto.

The short answer to all these arguments is that they establish that the issue raised by this petition is one ripe for decision by this Court because it was not resolved by an

"all fours" ruling in Hutto. Just as Hutto merited the grant of certiorari to provide a vehicle for an important ruling on the applicability of the Eleventh Amendment to the exceptions to the so-called "American rule" involved in that case, so, too, does this case provide an equally important vehicle for ruling on the applicability of the Eleventh Amendment to the class action fee awards.

The nature of the issue to be decided can best be understood in the context of the holding in Alyeska, supra, 421 U.S. at 257-259. At those pages, this Court reviewed the "judically fashioned exceptions to the general rule against allowing...attorneys' fees."*/ Included in this list was the authority to award fees against a party acting in bad faith or willful disobedience of court orders, as well as the traditional authority to award class action fees "from the fund or property itself or directly from the other parties enjoying the benefit." In Hutto, the bad

*/ This "general rule" is usually referred to as the "American rule" to distinguish it from the contrary rule in England.

faith basis for fee award was endorsed as available against a state litigant, as well as the exception for "costs." This petition presents the issue of whether another exception on the same list of exceptions presented in Alyeska, the class action fee award, is likewise available against a state litigant.

In short, Hutto appears to hold that all exceptions to the "American rule" fall outside the bar of the Eleventh Amendment, but the lower courts ruled otherwise without any analysis of this issue. There would appear to be no basis in logic or law to have a different rule for class action fee awards from the rule for other types of exceptions to the American Rule. If a state which has lost a case and gotten nothing from the litigation can be required, regardless of the Eleventh Amendment, to pay attorneys' fees as costs or because of its "bad faith," why should not a state which has received many millions of dollars in

benefits as a benefitting plaintiff class member likewise be required to pay a reasonable attorney's fee for the benefit it has received?

Prior decisions indicate an affirmative answer to this central issue, but none has had to face it squarely. The petition should be granted so that this issue can be addressed by this Court, and the pattern of law made consistent.

III. MASSACHUSETTS' TELEGRAM WAS A WAIVER

Massachusetts errs in claiming that it has not waived its Eleventh Amendment immunity.*/ It mischaracterizes its telegram with petitioner as a document which "might be sufficient to create a contract between [it and] Mr. Wagshal," but which does not

*/ The waiver issue is reached only if Massachusetts' view of petitioner's claim is accepted, i.e., that it is a claim on a contract. Petitioner maintains, however, that the wording of the telegram contract negates this position and that he is seeking a non-contractual equitable award contemplated by the telegram. See text, infra.

confer any right to sue in federal court. That position ignores the clear words of the telegram by which Massachusetts agreed to be subject to a federal fee award proceeding.

The telegram states specifically that Massachusetts agreed that petitioner

> MAY PLEAD A CLASS ACTION ON BEHALF OF OTHERS SIMILARLY SITUATED; [and that] MASSACHUSETTS WILL PAY ONLY ITS APPROPRIATE SHARE OF ANY CLASS ACTION FEE AWARD....

Petition, App. 9a. It would be difficult to conceive of a more specific agreement to pay a fee award made by the district court and a waiver of the Eleventh Amendment.

Again, this is a clearcut issue deserving of review by this Court.

The waiver issue, if reached, raises important Eleventh Amendment concerns and deserves consideration by this Court, because the adverse determinations by the lower courts

---

*/ By error, the issues of non-contractual class action fee award and waiver of a contract (if there was a contract) were somewhat confusingly intertwined in the original petition at pp. 9-10. However, petitioner views these as separate issues.

are at variance with a long line of decisions of this Court which permit waiver, starting with Clark v. Barnard, 108 U.S. 436 (1883).

CONCLUSION

Important issues of law are presented by this petition which have never been squarely decided by this Court. These issues fall in the middle of a well-developed, but now incomplete pattern of law which should be completed by a review of this case. It is important as a practical matter to establish whether an attorney who represents a class which includes state class members must risk going unpaid after conferring the benefits of his work on the class.

Respectfully submitted,

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